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OCTOBER TERM, 1970

No. ~~163~~ 9 163 6

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, ET AL.,
Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS W. McALILEY
ROBERT S. BECKHAM
NEAL P. RUTLEDGE
1010 Concord Building
66 West Flagler Street
Miami, Florida 33130

AND

CAROLE A. GARDINER
921 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioners

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Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner's pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 25, 1971

I

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A hereto (pp. 1-15), and the judgment of the District Court in Appendix B (pp. 1-6). The decision of the District Court is not reported, but the Court of Appeals decision is officially reported at 437 F.2d 388 (5th Circuit 1971).

II

JURISDICTION

The judgment of the Court of Appeals, set forth in Appendix A hereto, was entered on January 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III

STATUTES INVOLVED

The following statutes are involved and being lengthy are set forth in Appendix C hereto, infra.

1. Section 2, First of the Railway Labor Act, 45 U.S.C. §152.
2. Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107.
3. Section 8 of the Norris-LaGuardia Act, 29 U.S.C. §108.
4. Section 9 of the Norris-LaGuardia Act, 29 U.S.C. §109.

IV

QUESTIONS PRESENTED

The questions presented are:

1. WHETHER A DISTRICT COURT MAY, CONTRARY TO THE LANGUAGE OF SECTION 7 OF THE NORRIS-La-GUARDIA ACT, ENJOIN PEACEFUL PICKETING BY A LABOR ORGANIZATION IN A LABOR DISPUTE WITHOUT THE TESTIMONY AND CROSS-EXAMINATION OF WITNESSES OR OBTAINING A CLEAR AND EXPRESS WAIVER BY THE LABOR ORGANIZATION OF THIS FORM OF EVIDENCE.

2. WHETHER SECTION 8 OF THE NORRIS-La-GUARDIA ACT ALLOWS A CARRIER TO OBTAIN AN INJUNCTION AGAINST PEACEFUL PICKETING ARISING OUT OF A UNILATERAL CHANGE IN WORKING CONDITIONS BY THE CARRIER WITHOUT, PRIOR TO THE CHANGE, HAVING EXERTED EVERY REASONABLE EFFORT TO MAKE AND MAINTAIN AGREEMENTS CONCERNING RATES OF PAY, RULES AND WORKING CONDITIONS AS REQUIRED BY SECTION 2, FIRST OF THE RAILWAY LABOR ACT.

3. WHETHER THE CONTRACTING OUT OF SCOPE WORK (I.E., WORK TRADITIONALLY PERFORMED BY ITS EMPLOYEES UNDER THE SCOPE OF THEIR COLLECTIVE BARGAINING CONTRACT) WITHOUT NOTICE, OR AN OPPORTUNITY TO CONFER OR NEGOTIATE AND UNILATERALLY CHANGING ACTUAL OBJECTIVE WORKING CONDITIONS IS A SO-CALLED "MAJOR" DISPUTE UNDER THE RAILWAY ACT.

4. WHETHER THE EMPLOYEES HAVE THE RIGHT TO ENGAGE IN A PEACEFUL AND ORDERLY WORK STOPPAGE IN PROTEST OVER THE CARRIER'S CONTRACTING OUT OF SCOPE WORK, WITHOUT NOTICE OR A PRIOR OPPORTUNITY TO CONFER AND NEGOTIATE, AND IS SUCH A WORK STOPPAGE LAWFUL UNTIL REA ITSELF COMES IN COMPLIANCE WITH THE RAILWAY LABOR ACT.

V

STATEMENT OF THE CASE

This case presents issues under the Railway Labor Act and the Norris-LaGuardia Act that are complementary to and indeed inextricably related to a total consideration of the issues presently before the Court in *Chicago and Northwestern Railway Company vs. United Transportation Union*, 7th Cir. 1970, 422 F.2d 979, certiorari granted, October 12, 1970, 39 U. S. Law Week 3131.

This case arose when Respondent, REA, sued to obtain a labor injunction against BRAC and Petitioners,[1] who are subordinate labor organizations. The basis for REA's suit was that Petitioners had engaged in an illegal strike over a "minor" dispute under the Railway Labor Act, 45 U.S.C. §151 et seq. Respondent sought and received a temporary restraining order and this order was continued by agreement until the hearing of July 22, 1969, on REA's application for preliminary injunction. The answer of Petitioners here and defendants below denied that the work stoppage and picketing was illegal under controlling Federal law; claimed that the dispute was "major" because of REA's unilateral contracting out of scope work to another employer all without notice and an opportunity to confer and negotiate; that REA had themselves not complied with the Railway Labor

[1]The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers and Station Attendants (hereinafter BRAC) was an original party to the injunction suit in the District Court as well as to a pending suit seeking money damages against Petitioners. BRAC was dismissed from both suits by stipulation with Railway Express Agency, Inc. (hereinafter REA) and is not a party to this suit. Petitioners here are subordinate labor organizations and their officials. All emphasis will be supplied unless otherwise indicated.

Act and finally that the Court lacked jurisdiction to issue an injunction by virtue of the commands of the Norris-LaGuardia Act, 29 U.S.C. §101 et seq. Petitioners also filed a counterclaim seeking the restoration of the status quo ante until REA had followed the mandates of the Railway Labor Act, specifically Section 2 (Seventh) and Section 6, 45 U.S.C. §102 (Seventh) and Section 156.

REA maintains field offices at major airports around the country for the handling of REA air express transfer work. The work performed by REA employees at these facilities is that of picking up and handling air express, processing the various shipping documents, collecting charges and performing other routing, forwarding, tracing and ground and accessorial duties. It was admitted by REA and reflected in the opinions below that at the Atlanta Airport and indeed within the five-state Gulf District that REA employees have traditionally done this transfer work. In the Atlanta Airport where this controversy arose, REA employees had made the air express transfers for over 20 years. REA concedes the history of the five-state Gulf District concerning performance of the work in question, but presented affidavit evidence to the trial court that it had been able to contract out this work at other airports around the country. This was accepted by the trial court and the Court of Appeals for the Fifth Circuit (Appendices A & B). Petitioners do not concede this to be the case nor have they, for reasons hereinfater set forth, had an effective opportunity to develop facts concerning these alleged past practices.

The labor dispute between REA and the Petitioners that actually led to the work stoppage, and, hence, to this litigation began when REA, on June 1, 1969, con-

tracted out to Delta Air Lines a portion of REA's air express transfer work historically handled by Petitioners at the Atlanta Airport. This unilateral change in working conditions was made without any advance notice to Petitioners and without any opportunity of Petitioners or others to confer and negotiate with REA about this change, although REA had been meeting with the airlines over a substantial period of time. REA made the same offer to subcontract out the questioned transfer work to the other airlines using the Atlanta Airport, but only Delta, whose ground personnel are non-union, accepted. No Section 6 notice (45 U.S.C. §156) was filed and no party has taken this issue of subcontracting to Delta to an administrative tribunal. Petitioners protested the unilateral action of REA all to no avail. At no time did REA subsequently attempt to confer with any authorized union representative about the dispute, but two abortive meetings were held at Petitioners' insistence. REA did not even make a pretense of negotiation at these meetings. On June 16, 1969, picketing commenced and thereafter spread to other cities and to connecting railroads when Petitioners followed the work taken there by REA supervisors.

This suit was filed on June 25, 1969, and the temporary restraining order was entered on that date. On July 22, 1969, the District Judge held a hearing, noticed and scheduled as one on REA's application for preliminary injunction. The parties appeared for the hearing and over thirty witnesses were present and available to testify as to the issues in controversy. The trial judge asked the parties to stipulate to as many facts as possible, and then, after the hearing closed, to

submit affidavits to him concerning certain facts in controversy. At no time did Petitioners ever waive their right to present and cross-examine live witnesses or any procedural guarantees secured to them by Congress under the Norris-LaGuardia Act. The record is clear that there was no express waiver and Petitioners submit that a complete reading of the record will reveal that there is not even an implied waiver of any rights they may have under Sections 7 and 9 of the Norirs-LaGuardia Act, 29 U.S.C. §§107, 109.

There were many facts stipulated to by the parties, but certain crucial questions remained in dispute, namely: the magnitude of the change at the Atlanta Airport and its effect on the employees at REA, their wages and number of available jobs, and the bargaining unit of Petitioners; the precise nature of the change; the practice, if relevant, outside the five-state Gulf District; whether REA had made unilateral changes elsewhere, and if so, whether it affected jobs or the bargaining units; whether the change came to the attention of the union official charged with administering the contracting and enforcing the employees' Railway Labor Act rights; or whether any unilateral change elsewhere was done only after agreement, written or oral, with the responsible union officer.

Without further hearings the District Court on December 8, 1969, entered a permanent injunction characterizing the events of July 22, 1969, as a "hearing on the merits" (Appendix B, p. 1). That opinion did not contain findings of fact and conclusions of law and determined that the dispute at REA was a "minor" dispute in the parlance of the Railway Labor Act.

Petitioners appealed the order of the District Court to the Court of Appeals for the Fifth Circuit and received an adverse decision on January 25, 1971. The Fifth Circuit, while conceding that a change in working conditions had indeed taken place and without notice or prior opportunity for Petitioners to confer or negotiate with REA, held that the issue involved a mere interpretation of the collective bargaining agreement and thus was a "minor" dispute under the Railway Labor Act, and the jurisdiction of the Special Adjustment Board could be protected by injunctive relief. The Court of Appeals viewed the dispute as one over the breadth of management's prerogative to unilaterally subcontract scope work and declined to accept Petitioners' view that *Fibreboard Paper Products Corp. vs. N.L.R.B.*, 379 U.S. 203 (1964) dictated a result contrary to that found by the District Judge. The Fifth Circuit was further of the view that Petitioners ". . . appear to have waived oral testimony by witnesses. . ." and thus there was no violation of Section 7 of the Norris-LaGuardia Act under the circumstances at bar. Finally, the Court of Appeals below held that Section 8 of the Norris-LaGuardia Act only required REA to meet with Petitioners after it had subcontracted scope work to Delta in order to meet the duties imposed on the parties to a labor dispute under Section 2, First of the Railway Labor Act and perfect its right to enjoin peaceful picketing.

From these decisions below, this petition follows and the cause reaches this Court without one word of live testimony being received and without a single attempt by REA to settle the controversy by prior notice, and meaningful conference and negotiation.

VI

AGREEMENT AND REASONS FOR ALLOWANCE OF THE WRIT

The decisions below, if allowed to survive, destroy the procedural safeguards of §§7 and 9 of the Norris-LaGuardia Act, 29 U.S.C. §§107, 109 and ignore the requirements of §8 of the same Act of Congress, 29 U.S.C. §108 that those who seek the labor injunction must have complied ". . . with *any* obligation imposed by law . . ."

1. *The procedural requirements of Sections 7 and 9 of the Norris-LaGuardia Act, 29 U.S.C. §§107, 109.*

Congress in its wisdom was concerned about abuses of Federal District Courts in *granting* labor injunctions and passed the Norris-LaGuardia Act, 29 U.S.C. §101 et seq. That this Act placed ". . . limitations upon the jurisdiction and authority of the courts of the United States. . ." cannot be doubted. Section 2, Norris-LaGuardia Act, 29 U.S.C. §102. *Marine Cooks & Stewards vs. Panama Steamship Co.*, 362 U.S. 365 (1960); *Sinclair Refining Company vs. Atkinson*, 370 U.S. 195 (1962).

The plain language of the Norris-LaGuardia Act without more, would seem to compel the issuance of the Writ. The Act commences in Section 1 with a simple command:

> "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute except in *strict conformity with the provisions of this chapter* . . ." 29 U.S.C. §101.

Strict conformity to the procedural safeguards of the Act require ". . . hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint . . ." (29 U.S.C. §107) and that no labor injunction be granted except ". . . on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction . . ." (29 U.S.C. §109).

The Court of Appeals for the Fifth Circuit in its decision noted in its concluding paragraph that petitioners ". . . *appear* to have waived oral testimony by witnesses . . ." (Appendix A). Surely the Norris-LaGuardia Act requires more than the appearance of waiver. This Court, in a landmark Norris-LaGuardia Act case, *Marine Cooks & Stewards vs. Panama Steamship Co.*, supra, stated at page 369 that the Act's language is broad because Congress ". . . was intent upon taking the Federal Courts out of the labor injunction business except in very limited circumstances left open for federal jurisdiction. . ." In the same case, Mr. Justice Black pointed out with relevance here that strict compliance with all the requirements of the Norris-LaGuardia Act is a prerequisite to an injunction:

> "Even in the limited jurisdiction the Norris-LaGuardia Act leaves to federal courts in labor controversies, other sections of the Act narrowly circumscribe the cases where, the parties against whom, and the circumstances in which, injunctions may issue. If, however, issuance of a specific injunction is prohibited by one section, such as §4, compliance with the requirement of another section, such as §7, does not justify the injunction." 362 U.S. 365, 366, Footnote 2.

The Courts below were of the view that a labor injunction was necessary in order to vindicate the processes of the Railway Labor Act (Appendices A & B). Clearly if this is ultimately found to be the case, the District Court has the power and Norris-LaGuardia is no bar, *Brotherhood of Railroad Trainmen vs. Chicago River & I.R.C.*, 353 U.S. 30 (1957), but if and only if there has been "strict compliance" with every section of Norris-LaGuardia, including Sections 7 and 9, 29 U.S.C. §§107 and 109. This was not done, the Writ should be granted and the cause returned to the District Court on this ground alone.

The proceeding of June 22, 1969, and the events surrounding it give some explanation of why so fundamental an error was committed in a labor injunction case. The District Judge below had signed five TRO's and had before him a damage suit arising out of the events at REA. He was busy with other matters, the hearing on the preliminary injunction began late, and he was faced with a courtroom of over thirty witnesses ready to testify. Petitioners were there, prepared to put on testimony and have the opportunity to cross-examine live witnesses, not reply to cold affidavits with a patent inequality of opportunity to compete with REA on "national" data and contest practices alleged to have taken place outside the Gulf District. Petitioners cooperated with the Court in a sort of pretrial conference to narrow the issues. The price of such cooperation should not be a "waiver" of their rights under an Act of Congress, 29 U.S.C. §§107, 109. No "waiver" of any right under any Act of Congress was expressed, implied or intended. The record is to the contrary.

Hindsight, with perfect vision, at best would require Petitioners to inquire of the Court more specifically what it had in mind. Fair play, as well as Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107, would likewise seem to require that Petitioners be advised that affidavits were to be substituted for the presentation of its own witnesses and the confrontation and cross-examination of REA's witnesses, and that the hearing of July 22, 1969, was not at the very most what it was represented to be, that is, one on REA's motion for a preliminary injunction. At the very least Petitioners are entitled to an evidentiary hearing on the areas of conflict remaining after exhaustion of the stipulation and affidavit process.

2. REA failed to comply with the duty imposed by Section 2, First, and 2, Second, of the Railway Labor Act and in so doing failed to meet the statutory prerequisites of Section 8 of the Norris-LaGuardia Act for a labor injunction.

The "clean hands" provision of Norris-LaGuardia (29 U.S.C. §108) rarely arises in this context. Here, someone other than the national union with its statutory power to issue a Section 6 notice (45 U.S.C. §106), is insisting on its Railway Labor Act rights. Petitioners urge that Section 2, First, Section 2, Second, of the Railway Labor Act (45 U.S.C. §102 First, Second) coupled with the teaching of *Fibreboard Paper Products Corp. vs. N.L.R.B.*, 379 U.S. 203 (1964), and the plain language of Section 8 of Norris-LaGuardia command a reversal of the courts below irrespective of the fact that neither BRAC nor REA has seen fit to file a notice under Section 6 of the Railway Labor Act (45 U.S.C. §106).

The Court of Appeals below embraced *Rutland Railway Corp. vs. Bro. of Locomotive Engineers*, 2nd Cir. 1967, 307 F.2d 21, in reaching their decision. The Fifth Circuit interpreted *Rutland* to hold that the requirements of Section 2, First, and Section 2, Second, of the Railway Labor Act (45 U.S.C. §§152, First, Second), only require that a carrier and union "confer" after a unilateral change in working conditions but before going to court for a labor injunction. *Rutland*, supra, involved a case where the carrier was simply going to change train runs and regardless of the change the employees of *Rutland* were going to do the work and operate the trains. Here, of course, the facts are vastly different, for if the facts were identical to the situation in *Rutland* and the dispute involved an intercarrier transfer of work there is an express contractual provision covering such a contingency and the courts below would be nearer to being correct in their decision. But see *Shore Line R. Co. vs. Transportation Union*, 396 U.S. 142 (1969).

In this case, however, scope work (i.e., work traditionally performed by REA's own employees under the scope of their collective bargaining contract) was contracted out to another employer and Petitioners suffered harm both individually and to the bargaining unit.

If *Rutland* and the decision of the Fifth Circuit below both hold that the Railway Labor Act, under these facts, allow the carrier to make unilateral change without prior notice and an opportunity to confer and to contract out scope work to another employer and, only places the simple requirement of a subsequent abortive and meaningless conference as the prerequisite to meeting the requirements of Section 2, First, and 2, Second, of the Rail-

way Labor Act and thus Section 8 of the Norris-LaGuardia Act, then Petitioners can only urge that the issue be met squarely and summarily reversed.

If the Railway Labor Act does any one thing, it discourages a disruption of the status quo and the taking of unilateral action by any party. Its very purposes are: "(1) to avoid any interruption to commerce or to the operation of any carrier engaged therein . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules of working conditions. . ." (45 U.S.C. §151a). The first duties placed on all parties before the "major-minor" dispute issue is reached are to:

> "Exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. §152, First.
>
> "All disputes . . . shall be considered, and if possible, decided, with all expedition, in conference . . ." 45 U.S.C., §152 Second.

Mr. Justice Harlan stated it well for this Court in *Brotherhood of R.R. Tr. vs. Jacksonville Term. Co.*, 394 U.S. 369, 377-378 (1969) when he called the duty imposed by §2, First (45 U.S.C. §152, First) on both management and labor "the heart of the Railway Labor Act. . ." What happened here is the very thing that the Railway Labor Act seeks to prevent.

Section 8 of the Norris-LaGuardia Act (29 U.S.C. §108) in turn denies an injunction in a labor dispute to a complainant ". . . who has failed to comply with any obligation imposed by law . . . or who has failed to make every reasonable effort to settle such dispute by either negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." *Brotherhood of R.R. Trainmen vs. Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

Applying these Congressional Acts to the case at bar, the record is uncontroverted that Petitioners have historically obeyed the Railway Labor Act. Strikes were rare and REA, by following the Act had accomplished massive reductions in work forces. REA reduced its forces 38% in the Gulf District and 32% nationally in the period between 1965-1970. In effecting these changes Petitioners had come to expect, as indeed they have the right to expect, that they would have a prior opportunity to confer and negotiate.

REA contracted out scope work, performed by Petitioners for over two decades, all without warning, notice or an opportunity to confer. Income was affected and jobs stood in jeopardy. The inevitable happened and the trial court was confronted with a full-blown labor dispute. One can hardly conceive of a better way to provoke an interruption of commerce than these actions of REA.

Can it be said that an employer who contracts out a sizeable portion of the work being done by his employees fulfills the cardinal duty of §2, First, of the Railway Labor Act when he presents them with a shocking fait accompli—a threat to their vital welfare—on some gray

morning without warning or explanation, albeit the employer has planned and negotiated the move himself for weeks and months in advance? Section 2, First of the Railway Labor Act would seem to require more (45 U.S.C. §152, First) and indeed does require more.

This Court has recognized the adverse effect upon labor management relations of an employer making unilateral changes in working conditions even where there is no express prior agreement concerning the subject of the unilateral change, and has held such an action unlawful, *Fibreboard Paper Products Corp. vs. N.L.R.B.*, 379 U.S. 203 (1964). The Court of Appeals (Appendix A) seems to hold that *Fibreboard*, supra, and its own *United Indus. Wkrs of Seafarers, etc. vs. Bd. of Trustees of Galveston Wharves*, 5 Cir., 1965 351 F.2d 183, restrict mandatory bargaining about subcontracting and unilateral change by an employer in working conditions to the situations where a ". . . bargaining unit is eliminated in whole or substantial part." (Appendix A)

Decisions of other Courts of Appeal are to the contrary, e.g., *International Union, U.A., A. & A. Imp. Wkrs. vs. N.L.R.B.*, D.C. Cir, 1967, 381 F.2d 265, and it would seem to matter little that the subcontracting was begun piecemeal or that because a few men were involved or potentially involved that the unilateral change is "de minimus" and thus different legal duties apply. *Fibreboard*, supra, at 212-213, *Local 24 of Intern. Broth. of Teamsters, etc. vs. Oliver*, 358 U.S. 283 (1959), *International Union, U.A., A. & A. Imp. Wkrs vs. N.L.R.B.*, supra. This Court in *Fibreboard*, supra, relied on *Order of R.R. Telegraphers vs. Chicago & N.W. R.R.*, 362 U.S. 330 (1960) a decision under the Railway Labor Act, and

certainly it cannot be seriously disputed that the duty to bargain over change in working conditions is greater under the Railway Labor Act than the National Labor Relations Act., *Brotherhood of Railroad Trainmen vs. Akron & B.B. R. Co.*, D.C. Cir. 1967, 385 F.2d 581, 601. Likewise the assertion of a management's prerogative to claim "minor dispute" or the assertion of "non-bargainability" have little creditability under the Railway Labor Act, *Brotherhood of Railroad Trainmen vs. Akron & B.B. R. Co.*, supra; *Order of R.R. Telegraphers vs. Chicago & N.W. R.R.*, supra. The decision of the Court of Appeals below would seem for the first time in recent years to expand to the area of subjects beyond the pale of required bargaining.

The import of *Fibreboard*, supra, and the provisions that are the heart of the Railway Labor Act, Section 2, First, relate clearly to the issue here. If it is established that the working condition has been in effect for a substantial period of time and is the actual objective working conditions out of which the dispute arose, a carrier may not unilaterally change it—viz, subcontract out scope work—without first negotiating and this is true even in the absence of a specific contractual provision. See, *Shore Line R. Co. vs. Transportation Union*, supra.

When a carrier fails to negotiate about such a mandatory subject of bargaining, it does not comply with Section 2 of the Railway Labor Act (29 U.S.C. §152, First), and cannot be said to have complied with ". . . any obligation imposed by law. . ." or to have made ". . . every reasonable effort to settle such dispute . . ." as commanded by Norris-LaGuardia (45 U.S.C. §108) before the issuance of a labor injunction.

At the very least under the circumstances of this case, the employer has the duty to notify the employees bargaining representatives in advance and at least afford such representatives a *prior* opportunity to confer—if not negotiate—about the impending change which will so materially affect the employees and their job security. *Fibreboard Paper Products Corp. vs. N.L.R.B.*, supra; *Brotherhood of Railway Clerks vs. Florida East Coast Ry. Co.*, 384 U.S. 238 (1966); *Order of Railroad Telegraphers vs. Chicago & N.W. R.R.*, supra; *United Indus. Wkrs. of Seafarers, etc. vs. Bd. of Trustees of Galveston Wharves*, supra; *Weltronic Company vs. N.L.R.B.*, 6 Cir. 1969, 419 F.2d 1120; *Chicago B & Q R.R. vs. Railway Employees' Dept.*, D.D.C. 1969, 301 F. Supp. 603; cf. *N.L.R.B. vs. Katz*, 369 U.S. 736 (1962); *Shore Line R. Co. vs. Transportation Union*, 396 U.S. 142 (1969); *National Air Lines, Inc., vs. International Ass'n of M. & A. W.*, 5 Cir. 1969, 416 F.2d 998.

The above-cited provisions of the Railway Labor Act, the cases cited and specifically *Fibreboard*, supra, would seem, however, to require much more before a carrier can be said to have been in "strict compliance" with Section 8 of the Norris-LaGuardia Act, 29 U.S.C. §108. To qualify for the labor injunction, the carrier simply has to notify, confer or negotiate about impending change, especially on mandatory subjects of bargaining.

Notice before change with a concurrent opportunity to confer and negotiate is essential if Section 2, First, is to be meaningful, for the Fifts Circuit, itself, has noted "bargaining is a sham" if a carrier has already done in fact what it seeks to do by negotiation, *Florida East Coast Ry. Co. vs. Brotherhood of R. Trainmen*, 5 Cir. 1964, 336 F.2d 172, 180, cert. den., 379 U.S. 990 (1965).

This Court, in *Chicago & N.W. R.R. Railway Co. vs. United Transportation Union*, supra, has before it the question of whether a party, after the exhaustion of all major dispute procedures can, for the first time, litigate under Section 2, First of the Railway Labor Act (45 U.S.C. §152, First) the question of whether the parties "exert[ed] every reasonable effort to make and maintain agreements . . . and to settle all disputes." Clearly, the position of the *Chicago & Northwestern Railway Company* is much more extreme than that of these Petitioners both as to the existence and timeliness of a justiciable issue under Section 2, First of the Railway Labor Act. Petitioners here will not repeat the extensive arguments made in the pending *Chicago & Northwestern Railway Company* case, supra. If Section 2, First of the Railway Labor Act imposes duties upon the parties to a dispute under that Act, and Petitioners submit that it does, then clearly the issue presented in this petition arising out of the events at REA in Atlanta, Georgia, presents threshold considerations that must be resolved before the issue now pending in *Chicago & Northwest Railway Company* can be decided. It is one thing to urge as the carrier did in *Chicago & Northwestern Railway Company* that it can sit back and litigate the question of good faith bargaining after the exhaustion of major dispute procedures and quite another to urge that at the very inception of any change or alteration in rates of pay, rules and working conditions that a carrier is required, prior to change in working conditions, to sit down, confer and negotiate with the responsible union official and prevent an interruption in commerce and thus avoid presenting those officials with a fait accompli and a threat to the welfare of those they represent. Surely if Section 2, First, is to have any justiciable meaning, it would be in the context of the requirement

imposed by Section 8 of the Norris-LaGuardia Act for a carrier to ". . . comply with any obligation imposed on law. . ." prior to qualifying for the extraordinary relief of a labor injunction. Such a view of Section 2, First, read in conjunction with the entire Act, would be readily and easily enforceable and unlike the position advocated in *Chicago & Northwestern Railway Company* case by the carrier not do violence to the parties to a major dispute knowing when self-help was available to them with its salutary effects on realistic hard bargaining and reaching labor contracts. Section 2, First, and the duties imposed thereby, when viewed in the context of the dispute at REA in Atlanta, Georgia, would be readily enforceable by, on the one hand, a carrier knowing that it could not get a labor injunction unless it did make every reasonable effort ". . . to make and maintain agreements and to settle all disputes whether arising out of the application or otherwise. . ." and, on the other hand, the union knowing that if it did not deal in good faith with the carrier at the inception of a dispute, that the carrier or for that matter the union had recourse to the Federal Courts.

Petitioners submit that in this way, the purpose of the Railway Labor Act "(1) To avoid any interruption to commerce or the operation of any carrier engaged therein. . ." and ". . .(4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions. . ." (45 U.S.C. §151a) can be furthered and given practical meaning, and at the same time preserving the ultimate right of and time for self-help.

3. *Whether the contracting out of scope work (i.e., work traditionally performed by its employees under the scope of their collective bargaining contract) without notice,*

or an opportunity to confer or negotiate and unilaterally changing actual objective working conditions is a so-called "major" dispute under the Railway Labor Act.

The foregoing argument reflects that the entry of the injunction below was erroneous whether the dispute at REA be classified "major" or "minor" within the parlance of the Railway Labor Act because of the commands of Section 2, First, of the Railway Labor Act coupled with requirements of Section 8 of the Norris-LaGuardia Act.

Petitioners will not repeat the discussion of the nature of the dispute except to say that it is clear that when REA contracted out scope work in a way that adversely affected its employees and unilaterally changed the actual objective working conditions out of which the dispute arose, all without notice to Petitioners or an opportunity to confer and negotiate, then the dispute at REA was a "major" one under the Railway Labor Act. *Fibreboard Paper Products Corp. vs. N.L.R.B.*, supra; *Shore Line R. Co. vs. Transportation Union*, supra; *International Union, U.A., A. & A. Imp. Wkrs. vs N.L.R.B.*, supra; *United Indus. Wkrs of Seafarers, etc. vs. Bd. of Trustees of Galveston Wharves*, supra. That being so, it was error to enjoin Petitioners peaceful picketing with conditioning that injunction to require that REA comply with the Railway Labor Act. *Brotherhood of R. Train. vs. Atlantic Coast Line R. Co.*, 5 Cir. 1966, 362, F.2d 649, affirmed, 385 U.S. 20 (1966); *Brotherhood of Locomotive Firemen & Enginemen vs. Florida East Coast R. Co.*, 5 Cir. 1965, 346 F.2d 673; *Brotherhood of Locomotive Eng. vs. Baltimore & O. R. Co.*, 372 U.S. 284 (1963).

Here the District Judge believing the dispute to be "minor" issued a permanent injunction after a so-called "hearing on the merits" without even requiring that the matter be processed to the administrative tribunal. The only justification for an injunction in a labor dispute under the Railway Labor Act, in light of the plain language of Norris-LaGuardia, is to vindicate the processes of the Railway Labor Act. *Brotherhood of Railroad Trainmen vs. Chicago River & I.R.C.*, 353 U.S. 30 (1957). The record below is crystal clear that at the time of the hearing before the District Court on July 22, 1969, neither parties to the contract, BRAC or REA, had submitted this case to a Special Board of Adjustment. Clearly an injunction cannot issue even in a minor dispute where it has not been submitted to the administrative tribunal set up under the Railway Labor Act. *Manion vs. Kansas City Terminal Ry. Co.*, 353 U.S. 927 (1957); *Hilbert vs. Pennsylvania R. Co.*, 7 Cir. 1961, 290 F.2d 881, cert. den., 368 U.S. 900 (1961). REA did offer to submit the controversy to a Special Board of Adjustment, but the mere offer is not sufficient to entitle one to an injunction. *Itasca Lodge 2029 vs. Railway Express Agency*, 8 Cir. 1968, 391 F.2d 657.

4. *Whether the employees have the right to engage in a peaceful and orderly work stoppage in protest over the carriers' contracting out of scope work, without notice or a prior opportunity to confer and negotiate, and is such a work stoppage lawful until REA itself comes in compliance with the Railway Labor Act.*

Faced with the violations of REA, what then were the Petitioners' rights? Petitioners could go into a Federal Court and invoke its jurisdiction under Section 2,

First, of the Railway Labor Act and compel conference and negotiation. They could agree to arbitrate the dispute whether it be deemed major or minor. But they were not required to arbitrate. See *Brotherhood of R. T. etc. vs. Toledo P. & W. R.R.*, 321 U.S. 50 (1944); *Textile Workers Union vs. Lincoln Mills of Alabama*, 353 U.S. 448, 450-451 (1957); *National Air Lines, Inc., vs. International Assn. of M. & A. W.*, 5 Cir. 1969, 416 F.2d 998, 1102-1105. Faced, however, with REA's unilateral action, taken in violation of the law, Petitioners submit that they not only had the right to strike but that this right continued until REA itself came in compliance with the Act, voluntarily or otherwise, and employees could not be discharged for "engaging in an illegal strike." See *United Ind. Wkrs. of Sea. I. U. vs. Board of Tr. of Galveston Wh.*, 5 Cir. 1968, 400 F.2d 320, 332-334; *Butte A. & Pac. Ry. vs. Brotherhood of Locomotive Firemen*, 9 Cir. 1959, 268 F.2d, cert. den., 361 U.S. 864 (1959); *Brotherhood of R. R. Trainmen vs. New York Cent. R.R.* 6 Cir. 1957, 246 F.2d 114, cert. den., 355 U.S. 877 (1957); *National Air Lines, Inc. vs. International Ass'n of M. & A. W.*, 5 Cir. 1969, 416 F.2d 998, 1031. If this is the case, then clearly the ruling of the District Judge below enjoining the defendants but leaving REA free of sanctions is erroneous. *Brotherhood of R. Train. vs. Atlantic Coast Line R. Co.*, supra; *Brotherhood of Locomotive Firemen & Enginemen vs. Florida East Coast R. Co.*, supra; *Brotherhood of Locomotive Eng. vs. Baltimore & O. R. Co.*, supra; compare *Manion vs. Kansas City Terminal Co.* 353 U.S. 927 (1957). The decisions below should be reversed for this reason alone. *Order of Railroad Telegraphers vs. Chicago & N.W. R. Co.*, 362 U.S. 330 (1960).

VII

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and on further hearing on the merits the decision of the Court of Appeal, Fifth Circuit, reversed and the permanent injunction rendered by the District Court below in its Order of December 8, 1969, be vacated.

Respectfully submitted,

THOMAS W. McALILEY
ROBERT J. BECKHAM
NEAL P. RUTLEDGE
1010 Concord Building
66 West Flagler Street
Miami, Florida 33130

By_____

By_____

AND

CAROLE A. GARDINER
921 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

By_____
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to Fisher & Phillips, 26 Pryor Street, N.E. Atlanta, Georgia 30303, Attorneys for respondent, Railway Express Agency, Incorporated, and Arthur M. Wisehart, General Counsel, Railway Express Agency, Inc., 219 East 42nd Street, New York, New York 10017 this _____ day of April, 1971.

_____

Of Counsel

APPENDIX

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29256

RAILWAY EXPRESS AGENCY, INCORPORATED
Plaintiff-Appellee,

versus

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(January 25, 1971)

Before BELL, THORNBERRY, and CLARK, Circuit Judges.

BELL, Circuit Judge: This appeal by defendant-local unions presents questions arising from the entry of a permanent injunction against the further picketing of the employer-Railway Express Agency (REA) by defendants. The basic question is whether the dispute underlying the suit is major or minor as those terms are used in the Railway Labor Act, 45 USCA, §§ 151 et seq. With respect to

these questions, the international union from the beginning has agreed with REA that the dispute is minor and for resolution by a Special Board of Adjustment under the Act. Other questions for consideration have to do with the propriety and scope of the injunction aside from the major-minor dichotomy. We affirm.

REA, a nationwide express agency, is a "carrier" engaged in interstate commerce within the meaning of the Railway Labor Act. Appellants are local unions and their officers, who are named as defendants both in their individual and official capacities and as representatives of the classes of REA employees against whom this suit is brought. They are affiliated with the Brotherhood of Railway, Airline and Steamhip Clerks, Freight Handlers, Express and Station Employees (BRAC), an international union which is the exclusive bargaining agent for REA employees.[1] The union contract covering the employees here involved are those into which REA and BRAC entered. There is no contract between REA and the appellant-local unions.

The dispute between REA and appellants had its genesis in a change in work assignment at the Atlanta Airport. On June 1, 1969, REA by agreement with Delta Air Lines contracted out to Delta a portion of REA's air express transfer work which REA's employees had previously handled at Atlanta Airport. This change was instituted unilaterally without any advance notice to the union and without giving the union any opportunity to confer or negotiate with management.

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[1]BRAC, an original defendant was dismissed by stipulation and is not an appellant here.

REA maintains a field office or operation at the Atlanta Airport as it does at most major airports for the transfer of air express from one flight to another. Prior to June 1, 1969, REA employees handled all transfers between flights through the REA facility, with the exception of "ramp transfers"—a procedure by which airline employees handled very limited emergency transfers involving medicines, blood and the like. In late May, REA offered the airlines the opportunity to transfer routine express between their own flights using their own employees if the flight was to leave the Atlanta Airport within three hours. The purpose of the offer, according to REA, was to decrease the long delay in express processing which frequently occurred at the airport. Delta accepted the offer and the change was implemented on June 1, 1969. The same offer was declined by the other airlines at the Atlanta Airport.

There are three factual issues involved but, as will be seen, their resolution is unnecessary to our decision. One factual dispute is over the magnitude of the change from the standpoint of REA employees. REA says that the change transferred out fourteen per cent of the total volume of the express transfer work and that no jobs had been terminated due to the change. If all airlines accepted REA's proposal, an additional ten per cent of the air express would be transferred out of the REA terminal. Defendants say REA's action transferred out between thirty and forty per cent of the transfer work and that one job had been abolished. It does appear that this amount is all of the Delta express handled at the airport but, nevertheless, we deem that defendants take the position that something more is involved than what REA claims;

hence a factual dispute. Also, there is a dispute about the precise nature of the change. REA says it farmed out to Delta only intraline transfers that could arrive on one Delta flight and go out on another within three hours. Defendants say that Delta employees handle all or most of its intraline transfers without regard to the three-hour limitation.

A third factual dispute relates to the past history of REA's farming out of work as it did on June 1, and is not really a dispute. REA claims to have contracted out such work at other airports without notice to, or complaint from, the union in the past. In support of this contention, REA cites several instances in which transfer procedures similar to those now followed by Delta have been implemented at other airports throughout the country. Appellants' evidence indicates that REA has never before farmed out such work in the five-state Gulf District without prior union agreement or notice. REA does not dispute this contention, but instead relies upon information concerning airports outside of the Gulf District.

At any rate the Local REA employees were dissatisfied with the change and they engaged in a two-hour work stoppage on June 6. This stoppage ended voluntarily. Between June 6 and June 16, union officials discussed the matter with REA on several occasions, but no agreement could be reached. On June 16, picketing started in Atlanta, and a work stoppage ensued. Similar action later occurred at other southern cities. BRAC, (the international) viewed the dispute as minor and instructed the locals to discontinue the picketing, but it nevertheless continued. BRAC also notified the locals that REA would expedite the handling of the grievance by the Special Board of Adjustment

which had been created by the contract. No grievance was filed by the locals, however, since they did not consider the dispute to be minor.

On June 25, REA instituted an action for injunctive relief in the district court, seeking to enjoin the picketing and work stoppage. A temporary restraining order, issued on that date, was continued idefinitely on July 22 following a hearing. This hearing did not include testimony by witnesses. The issues were narrowed by counsel and some of the facts were stipulated a being undisputed. Affidavits and briefs were thereafter filed. It was agreed that the major-minor issue would be determined as a question of law on the undisputed facts if at all possible.

REA contends that the dispute arose out of the interpretation or application of agreements between REA and BRAC, and that it was a minor dispute within the meaning of the Railway Labor Act. It was the position of the local unions that the contracting or farming out of work which is within the scope of an existing contract gives rise to a major dispute under the Railway Labor Act, and that such was the case here. In addition, since action of such magnitude was taken by REA unilaterally, the locals were entitled to an injunction restoring the status quo ante. In any event, the locals asserted, since REA failed to discuss the matter in advance of acting, even if a minor dispute, the status quo ante should be restored. On December 8, 1969, the previously issued order was continued as a permanent injunction, "to protect the jurisdiction of the Special Adjustment Board which has jurisdiction of this dispute."

I

We turn first to the issue whether the dispute between the parties was "major" or "minor" in the parlance of the Railway Labor Act. In Brotherhood of Locomotive Firemen and Engineers vs. Florida East Coast Ry. Co., 5 Cir., 1965, 346 F.2d 673, we said:

> "Under the Railway Labor Act, minor disputes involve grievances or questions of interpretation of an existing collective bargaining contract; major disputes arise from efforts to change working conditions through the making of a new agreement." 346 F.2d at 676.

In making that statement, we, as was the case with the district court here, relied on Elgin, Joliet & Eastern Ry. Co. vs. Burley, 1945, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886, where the Supreme Court set out the rationale of the Act as it relates to the handling of disputes between management and labor. Major disputes must be resolved under the procedures set forth in § 6 of the Act, 46 USCA, § 156. There must be notices of intended changes, negotiations, possible mediation by the National Mediation Board. All of these procedures must be exhausted before the employer may implement the intended changes and before the union is free to strike. Minor disputes, on the other hand, are for arbitration before the National Railroad Adjustment Board or before a Special Adjustment Board established by the parties.[2] The Act provides for compul-

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[2]Section 2, Sixth of the Act, 45 USCA, § 152, is directed to minor disputes in the following language:

> "Sixth. In case of a dispute . . . arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ."

sory arbitration of all minor disputes and prohibits all strikes over minor disputes. Brotherhood of Railway Trainmen vs. Chicago River & Ind. Ry Co., 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed. 2d 622.

The dispute here narrows as follows. Appellants contend that REA contracted out "scope work" in violation of the agreement between REA and BRAC. The argument is that the employees of REA have always performed the air express transfer work at the Atlanta Airport. Thus, although not explicitly mentioned in the agreement, it is within the scope of the agreement and may not be transferred to others. To support this contention, appellants rely on past practices at the Atlanta Airport. The difficulty is that there is no mention whatever of any particular work assignment in the agreement.

REA, on the other hand, contends that it did not violate the scope clause of the agreement by unilaterally permitting Delta to make certain ramp transfers and thus did not violate the contract. REA relies primarily on past practices at other airports to support its interpretation of the scope clause. These practices were that REA contracted with airlines to make ramp transfers of freight on many occasions at these other airports although never before at the Atlanta Airport. The mode of transferring express, whether by REA or the airlines, was a continuing subject of negotiation between REA and the airlines in the interest of rendering efficient service to the public. REA also relies on the management prerogatives clause, which preserves "the right of management to determine methods of operation and the utilization of the working forces. . . ."

We are not impressed by the argument that the scope of the agreement must be implied from past practices at the Atlanta Airport rather than nationwide. The agreement here is a nationwide agreement, covering employees in an industry of peculiarly national character. Therefore, the implied terms of the agreement must be found by looking to the work traditionally performed by REA employees on a national rather than on a local level. It is undisputed that the pact practices on the national level has been for management to make air express transfer changes of the type here involved unilaterally.

The dispute in reality is over the breadth of management's prerogative. There are no provisions in the agreement which expressly reserve the work in question to REA employees. Likewise, there is no express provision allowing management to transfer the work unilaterally. However, the agreement does expressly reserve "the right of management to determine methods of operation and the utilization of the working forces. . . ." Moreover, there is an undisputed history of such unilateral transfers of work with no apparent objection from the union. It may be concluded, as the district court did conclude, that this state of facts gave REA at least the arguable right to make the transfer to Delta. Whether it actually has such a right must be determined by the Special Adjustment Board.

We also conclude, for the purpose of defining the extent of which a federal court may intervene in a railway labor dispute and enjoin a strike, that the dispute here is a minor one involving the interpretation of existing agreements. This position receives substantial support from the case of Rutland Railway Corp. vs. Bro. of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), cert. denied,

1963, 372 U.S. 954, 83 S. Ct. 949, 9 L.E.2d 978, which involved management's prerogative to unilaterally reschedule train runs where there was to be a resultant loss in employment. The court there determined that the dispute fell into the minor category although the agreement between the parties contained no express provision covering the subject. See also Missouri-K.T. RR vs. Bro. of Locomotive Engineers, 5 Cir., 1959, 266 F.2d 335, rev. on other grounds, 1960, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379; In the Matter of Hudson & M. R. R., S.D. N.Y., 1959, 172 F. Supp. 329, aff'd sub nom. Stichman vs. General Grievance Committee, 2 Cir., 1959, 267 F.2d 941.

Also, it is significant that BRAC (the international) agrees that the dispute is minor. BRAC President Dennis wired appellants stating that the dispute was not a strikeable one, that REA had agreed to expedite the matter to the Special Board of Adjustment, and that the strikers should immediately return to work. This position buttresses the decision that the dispute is minor when considered in light of the fact that BRAC is the certified statutory bargaining agent.

We are not inclined to view this matter as analogous to cases where the bargaining unit is eliminated in whole or substantial part. Cf. Fibreboard Paper Prod. Co. vs. NLRB, 1964, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233; United Indus. Wkrs. of Seafarers, etc. vs. Bd. of Trustees of Galveston Wharves, 5 Cir., 1965, 351 F.2d 183.

Since the dispute was minor, it follows from the *Chicago River* case, supra, that the district court had the power to enjoin appellants.

II.

The next question is whether, considering the circumstances, REA was entitled to an injunction. Appellants contend that REA did not comply with the requirements of § 8 of the Norris-LaGuardia Act. 29 USCA, § 108[3] This "clean hands" section provides that no injunction shall be granted to any complainant who has failed to comply with any obligation imposed by law or who has failed to make every reasonable effort to settle the dispute by negotiation or otherwise.

It is undisputed that REA did not confer with the union before instituting the change in dispute. Appellants' position is that a strike pursuant to a minor dispute (while not conceding that the dispute is minor) is not enjoinable where the employer failed to confer with employees prior to instituting the change from which the dispute arises. REA argues that the clean hands provision does not bar injunctive relief as long as they conferred with the union before seeking an injunction, not necessarily before instituting the change. Since both parties rely on Rutland, supra, it is necessary to examine that decision.

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[3]29 USCA, § 108:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In Rutland, the Second Circuit carefully examined the duty to confer imposed on disputing parties by § 8 of Norris-LaGuardia and by § 2 First, Second and Sixth of the Railway Labor Act. Section 2 First and Second, place a duty on both parties to the dispute to make every reasonable effort to settle the matter, major or minor, and as part of their efforts, to confer over their differences. Section 2 Sixth, promulgates a procedure for calling a conference after request to discuss a minor dispute. All of this is to occur before submission of the dispute to the Railroad Adjustment Board Section 8 of Norris-LaGuardia was enacted subsequent to the Railway Labor Act, and provides that an injunction cannot be obtained by one who has not complied with any obligation imposed by law or has not made every reasonable effort to settle the dispute by negotiation. The court in Rutland held that the duty to negotiate, in the context of a minor dispute does not mean that the employer must negotiate with the union prior to instituting changes in train runs. Whether there should be full scale negotiation is for the Adjustment Board to decide. The duty on the employer was analyzed as follows:

> "But in minor disputes involving the scope of the managerial prerogative it must be that Section 2 First, Second and Sixth of the Railway Labor Act together with the Norris-LaGuardia Act impose some lesser duty on a railroad which seeks injunctive relief. . . . Therefore, we hold that the relevant sections . . . impose a duty upon the railroad, short of negotiation, to take some reasonable steps toward dispute settlement before it can obtain an anti-strike injunction. These lesser efforts are comprehended within the con-

cept of "conferring." Rutland Railway Corp. vs. Bro. of Locomotive Engineers, 307 F.2d 21, 40 (2d Cir. 1962).

The court went on to define conferring as basically a getting together with a sincere effort to resolve their differences, with each side explaining its position and listening to the contentions of the other side. Since the district below in Rutland did not make a finding that the railroad made reasonable efforts to settle the dispute in conference, the injunction was dissolved and the case remanded to determine whether the employer had conferred.

In sum, Rutland makes it clear that the requirement to attempt to settle disputes is not a requirement to bargain with the union before making changes which lead to a minor dispute. Like Rutland, the instant case involves a minor dispute over the scope of the managerial prerogative, in which management has the duty to confer with the union over the dispute before it is entitled to an anti-strike injunction. Unlike the Rutland case, however, the district court here made sufficient findings to demonstrate good faith confering. The record amply supports this view. There was no failure on the part of REA to comply with the statutory prerequisites to an anti-strike injunction.

III.

Appellants also contend that any injunctive relief afforded REA should be conditioned upon restoring the status quo ante. In Missouri-K.-T. R.R. v. Bro. of Locomotive Engineers, 1960, 363 U.S. 525, 80 S.Ct. 1326, 4 L.Ed.2d 1379, the Supreme Court held that in a minor dispute situa-

tion, while the statutes say nothing about restoration of the status quo ante, such status quo may be maintained by freezing the conditions sought to be changed by the carrier or by allowing the change but requiring the employer to continue paying the affected employees. Such relief by way of conditions is addressed to the district court's equitable discretion, the exercise of which is reviewable only for abuse of that discretion.

In the instant case, the district court in its final order did not grant, or even mention, appellants' request for a restoration of the status quo ante. At the July 22 hearing, however, and in a July 25 interim order, the district court made it clear that its discretionary powers in this area were understood and that it was prepared to exercise it if any subsequent change had a substantial adverse affect upon the employees. We find no abuse of discretion in the district court's declining to condition issuance of an injunction upon restoration of the status quo ante. See generally United Ind. Wkrs of Sea. I.U. v. Bd. of Trustees of Galveston Wharves, 5 Cir., 1968, 400 F.2d 320.

IV.

This leaves one final question for decision: whether the district court complied with statutory procedural prerequisites to granting the injunction:

On July 22, 1969 a hearing was held to determine whether a preliminary injunction should be granted. As noted, no witnesses were heard, but the parties stated their positions and stipulated as to some undisputed facts. Briefs and affidavits were to be and were filed later. There were

remaining factual disputes after the affidavits were filed. Appellants assert that such a procedure was a patent violation of § 7 of the Norris-LaGuardia Act, 29 USCA, § 107, which provides:

> "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered. . . ."

REA's position is one, that appellants waived the taking of oral testimony, and two, that the resolution of all factual disputes in favor of the unions would not indicate a different result on the injunction question.

In Missouri-K.-T. R.R. v. Bro. of Locomotive Engineers, 5 Cir., 1959, supra, this court was faced with a similar problem, except that there the district court did not make findings of fact as required by § 9 of Norris-LaGuardia, 29 USCA, § 109. The court held, however, that since the material facts were admitted (i.e. the strike, the matters in controversy though not their legal effect, and the submission of the controversies to the appropriate Boards), the specific provisions of the Railway Labor Act took precedence over the general provision of Norris-La Guardia. Therefore, strict compliance with § 7 was not required.

Here the crucial facts were stipulated by counsel. There was no dispute as to the picketing, what it was about, or the applicable agreements. The remaining factual disputes concern the effect of the dispute on the number of jobs and the precise nature of the change as implemented. The resolution of both these disputes in favor of the appellants would not change the nature of the controversy — a non-strikeable minor dispute. Added to the above is the fact that appellants appear to have waived oral testimony by witnesses if the only issue remaining was a legal one in light of the undisputed facts. We hold this to be the case. There was no violation of § 7 of the Norris-LaGuardia under these limited circumstances.

AFFIRMED.

APPENDIX B

ORDER

Filed Dec. 8, 1969

This action for injunctive relief was instituted on June 25, 1969, by Plaintiff Railway Express Agency (REA) to enjoin the allegedly unlawful picketing and work stoppage in which defendants engaged after REA, without prior notice to defendants, permitted Delta Air Lines to begin making certain Atlanta airport intraline express transfers which formerly had been made by REA's employees. A temporary restraining order issued on June 25th has twice been continued in force by consent of the parties — the last such time being July 22, 1969, when it was continued indefinitely following hearing on the merits.

On September 22nd an order was issued granting the joint motion by REA and Defendants Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), and Paul J. Masson, to dismiss without prejudice as to those two defendants. The case is now before the court for consideration of REA's motion for an injunction to preserve the jurisdiction [895] of the Special Adjustment Board which plaintiff contends has jurisdiction over this dispute under the Railway Labor Act, upon defendants' counterclaim for an injunction to prevent REA from continuing to turn over to Delta Air Lines the air-freight transfer work in question, and upon REA's motion to amend the complaint in order to conform the caption of that pleading to the class action allegations contained herein. The latter motion is a technical one to which defendants have not objected

and which is clearly proper under the liberal amendment provisions of the Federal Rules. Accordingly, it will be granted.

Plaintiff REA, a nationwide express agency, is a "carrier" engaged in interstate commerce within the meaning of the Railway Labor Act (45 U.S.C. § 151, et seq.). Defendants are local unions and their officers, who are named as defendants both in their individual and official capacities and as representatives of the classes of REA employees against whom this suit is brought. Plaintiff alleges, and the court finds as a fact, that BRAC (International) is the exclusive bargaining agent for REA employees and has been certified as such by the National Mediation Board. The only union contracts covering these employees are those into which REA and BRAC have entered; there are no contracts between REA and any of the district or local union defendants involved in this case. It follows, therefore, that no district or local union has any statutory or contractual right to represent REA employees except as an agent of BRAC.[1]

The record shows that in April, 1969, REA and representatives of all air lines operating at the Atlanta airport met, at the latter's request, to discuss ways of decreasing the long delay in express processing which frequently

[1]The Court is not unmindful of the fact that when BRAC entered into this bargaining agreement it did so as the bargaining agent of REA's employees. And thus each employee does have a very real interest in the provisions of that contract. However, individual employees are not actual parties to the contract. The Fifth Circuit recognized this distinction in Illinois Central R.R. vs. Moore, 112 F.2d 959 (5th Cir. 1940), *rev'd. on other grounds*, 312 U.S. 630, where it said that although the collective agreement contains a contract between union and carrier it is not itself a contract of employment but rather is only a basis agreed upon as mutually satisfactory for making contracts of employment.

occurred at the airport. A a result of that meeting, on May 21st REA offered the air lines the opportunity to transfer express between their own flights if certain specified conditions were met.[2] Delta accepted the offer and the new procedure was implemented on June 1, 1969.

The parties have stipulated that prior to June 1st the unions had not been contacted about the Delta express transfers but that on June 6th a group of union people met with REA's operations manager to discuss the situation, and on June 11th the general chairman of the Gulf District discussed the matter with REA's vice president, Mr. L. R. Howard. It is further stipulated that the union has not filed a grievance under the minor dispute provisions of the Railway Labor Act.

Defendants have taken the position that the work which REA has turned over to Delta is, under the terms of the collective bargaining agreement, work which only REA employees can do. It is therefore "scope work", defendants contend, and is a mandatory subject of bargaining. According to that view, the present dispute [897] is a major one[3] in that by turning freight transfer work over to Delta, REA has attempted to change the terms of

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[2]There is a dispute as to the conditions imposed but that issue cannot and need not be decided by this court.

[3]Major disputes are those concerned with the formation of collective bargaining agreements or with efforts to secure such agreements; they look to the acquisition of rights for the future rather than to rights which vested in the past. Minor disputes, on the other hand, arise where there is an existing agreement and there has been no effort to bring about a formal change in terms or to create a new agreement, but the dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. Elgin, Joliet & Eastern Ry. vs. Burley, 325 U.S. 711 (1945).

the bargaining agreement without following the procedures required by the Railway Labor Act.[4] Defendants' resort to self-help and the resultant work stoppage were therefore lawful, it is alleged, and protected from a federal court injunction by the provisions of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115.

It is undisputed that the work covered by the bargaining agreement is not expressly set forth in the agreement and that the question as to whether the freight transfer work which was turned over to Delta is "scope work" will have to be determined by reference to past practices. Defendants contend that since REA employees at the Atlanta airport have been performing the work in question for more than 20 years it is by implication scope work under the collective bargaining agreement. REA, on the other hand, contends that the bargaining unit is not local in nature and that not local past practices but national past practices must be used to determine what is included as scope work under the terms of the collective bargaining agreement between REA and BRAC — an agreement which [898) covers REA employees on a nationwide basis. Under REA's view, decisions as to intraline freight transfer procedures lie within the area of management prerogative specifically conferred upon REA by the agreement. And in support of that contention REA cites numerous instances in which intraline transfer procedures similar to those now followed by Delta at the Atlanta airport have been used at other airports throughout the country.

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[4] 45 U.S.C. § 151, et seq.; *see also* Elgin, Joliet & Eastern Ry. vs. Burley, supra n.2; Brotherhood of R.R. Trainmen vs. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969).

The national character of labor relations in the railroad industry was noted by the United States Supreme Court in California vs. Taylor, 353 U.S. 553 (1957). That case dealt with a question which does not arise in this case, of course (i.e., whether the Railway Labor Act applies to state-owned railroads), but much of the Court's reasoning appears to be generally applicable to all cases arising under the Railway Labor Act. The Court in Taylor emphasized that agreements in the railroad industry uniformly are negotiated for, and regulate rates of pay and working conditions of, employees in an entire railroad system.[5] With this in mind, it clearly cannot be said that there is no merit to REA's contention that the implied terms of the bargaining agreement in the case must be found by looking to the work traditionally performed by REA employees on a national rather than merely on a local level.

The record shows that in June, 1969, there were at least two conferences between REA officials and representatives of the disgruntled [899] employees. Furthermore, the court notes that both parties to the collective bargaining agreement have taken the position that the dispute will be controlled by interpretation of the bargaining agreement and that the dispute should be presented to the Special Adjustment Board. Although defendants take issue with that view, they nevertheless rely upon their own interpretation of the contract to show that REA has attempted unilaterally to change the agreement.

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[5]The Court quoted the House Committee on Interstate and Foreign Commerce, as follows: "Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules of working conditions of employees in many States. H.R.Rep.No. 2811, 81st Cong., 2d Sess. 5." California vs. Taylor, 353 U.S. 553, n.15 at 567 (1957).

A dispute of this kind could be considered a major one only if the existing agreement contains express or implied provisions inconsistent with REA's proposals. "It is a minor dispute if the . . . agreement contains a clearly governing provision or if what the railroad seeks to do is supported by customary and ordinary interpretation of the language of the agreements," Rutland Ry. Corp. vs. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962). Since the collective bargaining agreement in question might reasonably be interpreted as plaintiff contends, the court finds that the primary issue in the case is one of contract interpretation. The dispute therefore is a minor one and the issue must be presented to the Special Adjustment Board created by the parties to the collective bargaining agreement. Rutland Ry. Corp. vs. Brotherhood of Locomotive Engineers, supra at 36.

Accordingly, REA's motion to amend the complaint is GRANTED and temporary restraining order previously issued by this court shall be continued as a permanent injunction to protect the jurisdiction of the Special Adjustment Board which has jurisdiction of this dispute.

IT IS SO ORDERED.

This 8th day of December, 1969.

/s/ Newell Edenfield

NEWELL EDENFIELD
United States District Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

The statutory provisions principally involved are Section 2, First, of the Railway Labor Act, 45 U.S.C. § 152, First, and §§ 7, 8, and 9 of the Norris-LaGuardia Act, 29 U.S.C. §§ 107, 108 and 109, which provides as follows:

A. Section 2, First, of the Railway Labor Act, 45 U.S.C. § 152, First, is as follows:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

B. Sections 7, 8 and 9 of the Norris-LaGuardia Act, 29 U.S.C. §§ 107, 108 and 109, are as follows:

> "Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint

made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complaint by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known

persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or pro-

ceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitted themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

"Sec. 8 No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

"Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and shall be expressly included in said findings of fact made and filed by the court as provided herein.

"Sec. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except matters of the same character"

[Sections 11 & 12 have been repealed, c.645, § 21, 62 Stat. 862 (1948)].

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1636

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, *et al.*,

Petitioners,

—v.—

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

ARTHUR M. WISEHART
Attorney for Respondent
219 East 42nd Street
New York, New York 10017
(212) 557-8800

FISHER & PHILLIPS
of Counsel
26 Pryor Street, N.E.
Atlanta, Georgia 30303
(404) 523-8586

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BRIEF OF RESPONDENT REA EXPRESS, INC.* IN OPPOSITION TO CERTIORARI

I.

Opinions Below

The opinion of the District Court for the Northern District of Georgia, by Judge Newell Edenfield, is reported in 306 F. Supp. 1243 and is included in Petitioners' Appendix as Appendix B.

The opinion of the Fifth Circuit Court of Appeals, by Judge Bell and concurred in by Judges Thornberry and Clark is reported in 437 F.2d 388 and is included in Petitioners' Appendix as Appendix A.

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* As of June 1, 1970, Railway Express Agency, Incorporated changed its name to REA Express, Inc.

II.

Statement of the Case

Unlike the petition for certiorari which contains factual assertions at odds with, or not supported by the record (see Attachment A hereof), the statement herein is confined to facts as determined by the District Court and affirmed by the Court of Appeals.

The circumstances leading to the instant case are simple. REA offered to let each airline at Atlanta transfer any express shipments between its own flights provided that it could do so within the next three hours (App. A-3).[1] This was done to decrease the long delay in express processing which frequently occurred at the airport (App. A-3). Delta began making such ramp transfers on June 1, 1969 (App. A-3).

The change was similar to the handling of ramp transfers elsewhere on the REA system, and REA took the position that it was entitled to take the action as a "past practice" and pursuant to the management rights clause of its collective bargaining agreement (App. A-7).

However, on June 16, the local union struck and picketed at Atlanta (App. A-4). The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), an international union which is the exclusive bargaining agent for REA employees (App. A-2), viewed the dispute as minor and instructed the local to discontinue its activities but they nevertheless continued (App. A-5). REA obtained a temporary re-

[1] References to Petitioners' Appendix will be referred to as App. A or App. B with the page number as a suffix.

straining order and on July 22, 1969, at the hearing, the parties agreed to stipulate all the relevant facts (App. A-5). The Atlanta District Court on December 8 entered a permanent injunction. Petitioners appealed the order to the Court of Appeals for the Fifth Circuit, which affirmed the decision from which Petitioners seek Certiorari.

ARGUMENT

I.

Collateral Estoppel.

In September 1970, the Special Board of Adjustment issued ten decisions in the cases of employees disciplined by REA for participating in the Atlanta strike. The Special Board found that it had jurisdiction over the matters and that the employees "participated, without legal or contractual warrant, in a course of conduct inimical to the best interest of the Company, the Union and the employees . . . [over] differences concerning the application and interpretation of the Agreement." (Award 25, Attachment B hereof. The other nine decisions are substantially similar.)

Under Section 3, First (m) of the Railway Labor Act, the awards of the Adjustment Board are final and binding upon the parties to a dispute, subject to limited judicial review common to arbitration decisions. This case is not a judicial review of the decision of the Board of Adjustment, and a collateral attack is not permissible. *Railroad Yardmasters* v. *P. & L. E. R.R.*, 39 F. Supp. 876 (N.D. Ohio 1940). The Board of Adjustment has exclusive jurisdiction over disputes concerning the application and interpretation

of the agreement. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

The decisions of the Special Board of Adjustment, the agency that has exclusive jurisdiction of this dispute, have disposed of all relevant issues of fact in this proceeding. It has decided that the union's action was an illegal strike over the interpretation of a collective bargaining agreement that discipline was warranted. (See Attachment B, p. 15.) This finding, which is binding on all parties to the decisions, including Petitioners, rejects the Petitioners' assumption that the strike was justified because of a "unilateral change in working conditions" (Question 2), that REA contracted out "work traditionally performed by its employees under the scope of their collective bargaining contract" (Question 3), and that REA contracted "out scope work" (Question 4). The issues which Petitioners seek to raise therefore are moot based on decisions of the agency having exclusive jurisdiction to make such determinations in a manner which is "final and binding" on the parties. See *Freeman on Judgments* §633, p. 1535 (5th Ed.); *Tidewater Oil Company* v. *Jackson,* 320 F.2d 157 (10th Cir. 1963), *cert. den.* 375 U.S. 942 (1963).

II.

Certiorari Should Not Be Granted to Review a Hypothetical Case.

Both courts below adequately disposed of Petitioners' contentions. The only way that Petitioners have been able to frame their questions presented is to assume facts contrary to the findings of the courts below.

The first question presupposes that there has been no "clear and express waiver by the labor organization" (Pet.,

p. 3). Yet the Court of Appeals said that "the crucial facts were stipulated by counsel" and Petitioners "appear to have waived oral testimony by witnesses" (App. A-15).

The second question assumes that this case involves "a unilateral change in working conditions" without the carrier having exerted every reasonable effort to "maintain agreements concerning rates of pay, rules, and working conditions" (Pet., p. 3). Yet the District Court found that "the primary issue is one of contract interpretation," not a change in working conditions (App. B-6), and the Court of Appeals concluded that REA had "at least the arguable right to make the transfer . . . " (App. A-8). This was confirmed by the determinations of the Special Board of Adjustment (App. B).

Petitioners' third and fourth questions (Pet., p. 4) assumed that REA contracted out "work traditionally performed by its employees under the scope of their collective bargaining contract." However, the Court of Appeals confirmed the District Court's finding that "the past practices on the national level has been for management to make air express transfer changes of the type here involved unilaterally" (App. A-8).

The foregoing findings of fact may not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a). See *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 at 495-6 (1950). As affirmed by the Court of Appeals, the findings became the work product of two courts, and entitled to be respected as such. Under the "two court" rule, such findings are conclusive. *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271 at 275 (1949), and cases cited therein; *Virginia Railway* v. *System Federation No. 40,* 300 U.S. 515 at 542 (1936); *Texas, New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U.S. 548 at 558 (1930).

Based on the similar findings of the lower courts and of the Adjustment Board, the facts assumed by Petitioners in their questions presented are not true, and certiorari should be denied. *Stern & Gressman, Supreme Court Practice,* 140-141 (3d ed. 1962).

III.

There Is No Issue of Importance Warranting Certiorari.

The facts as found below establish that an injunction was granted on affidavits and stipulations of counsel in a minor dispute. This is not an unusual or important case. This Court has repeatedly held that such a strike may be enjoined. *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.,* 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *L. & N.,* 373 U.S. 33 (1963); *Elgin, Joliet & E. R. Co.* v. *Burley,* 325 U.S. 711 (1945).

Further, the main petitioner in reality is a run-away local union which acted contrary to the instructions of the international, the bargaining representative (App. A-5). The local's appropriate remedy, if it believed REA had violated the Railway Labor Act, was to go to court to seek an injunction against the change. (See *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen,* 337 F.2d 127 (D.C. Cir. 1964).) Instead it chose to indulge in economic warfare in violation of the Act. Certainly this Court, with its crowded docket, should not exercise its discretion to grant certiorari in a case involving a local union which prefers to brawl rather than to resort to available legal remedies.

IV.

No Conflict in Decisions Is Involved.

No cases cited by Petitioners involve a minor dispute and hence there is no real conflict either between the Circuits or between the Fifth Circuit's decision in this case and prior Supreme Court decisions.

Chicago & N. W. R. R. Railway Co. v. *United Transportation Union,* 422 F.2d 979 (7th Cir. 1970), in which this Court has granted certiorari, is completely irrelevant. It involved the duty to bargain in a major dispute and is not at all related to the case here, which involves a minor dispute.

CONCLUSION

Certiorari should be denied and the petition dismissed.

Respectfully submitted,

ARTHUR M. WISEHART
Attorney for Respondent
219 East 42nd Street
New York, New York 10017
(212) 557-8800

FISHER & PHILLIPS
of Counsel
26 Pryor Street, N.E.
Atlanta, Georgia 30303
(404) 523-8586

Certificate of Service

I hereby certify that a true copy of the foregoing Brief in Opposition to Certiorari was mailed to Thomas W. McAliley, 1010 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and Carole A. Gardiner, 921 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, Attorneys for Petitioners, this 21st day of May, 1971.

PETER G. WOLFE

ATTACHMENT A

Errors of Fact in the Petition for Certiorari

Petition Page	Errors
7	Petitioners claim there was a "unilateral change in working conditions." The Court of Appeals specifically found that REA had "at least the arguable right to make the transfer to Delta" (App. A-8).
7	Petitioners claim that REA did not "attempt to confer with any authorized union representative about the dispute." However, the Court of Appeals found "the district court here made sufficient findings to demonstrate good faith conferring. The record amply supports this view" (App. A-12).
8	Petitioners state that they did not "waive their right to present and cross-examine live witnesses." However, the Court of Appeals stated that Petitioners "appear to have waived oral testimony by witnesses" (App. A-15).
8	Petitioners claim that there was a dispute about "the practices, if relevant, outside the five-state Gulf District." The Court of Appeals found "it is undisputed that the past practices on the national level has been for management to make air express transfer changes of the type here involved unilaterally" (App. A-8).

ATTACHMENT B

Award No. 25
Case No. 25

Special Board of Adjustment No. 752

Parties: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

and

REA Express

Statement of Claim: "Claim of District Committee of Brotherhood that:

1. The Agreement governing hours of service and working conditions between the parties, effective January 1, 1967, was violated by the Agency at Atlanta, Georgia, when on June 19, 1969, Employee W. D. Compton was held out of service pending investigation and was further violated when on July 2, 1969, he was notified by Operations Manager B. C. Henderson that he was removed from service, effective July 2, 1969, as a result of the investigation held on Friday, June 27, 1969, being allegedly charged with violation of Rule 59 and 67 of the Agency's General Rules and Instructions, and charged specifically with being absent from work on Monday,

June 16, 1969, without permission, and also charged with aiding and abetting and actively participating in an unauthorized work stoppage on Monday, June 16, 1969, and

2. That Mr. W. D. Compton shall be restored to service with seniority rights unimpaired, his record shall be cleared of the charges and he shall be compensated for all monetary loss of pay retroactive to July 2, 1969, and continuing thereafter until such time as he is restored to service, with seniority rights unimpaired, and his record cleared of the charges, and

3. Mr. Compton shall be additionally compensated for any overtime which he would have received, and any expense incurred by him due to Agency cancelling Health and Welfare Insurance Policy No. 817100 with Travellers Insurance Company, and he having to assume premium payments."

Discussion: There was an unauthorized work stoppage at the Atlanta, Georgia, Air Express Terminal from June 16 to 27, 1969. The employees took this action because the Company was permitting Delta Airline employees to handle certain "ramp shipments" allegedly in violation of the Scope Article of the Schedule Agreement as well as established local practice.

The Claimant was an employee with 25½ years seniority and a member of the Local Protective Committee. At the time of the occurrence giving rise to this claim, he was

employed as a Revision Clerk at the Atlanta Air Express Facility with his hours of assignment being 3:00 P.M. to 11:30 P.M., Monday through Friday.

The Claimant was dismissed from the Company's service as a result of an investigation held on June 27, 1969, for being absent from work without permission on June 16, 1969, and for also actively participating in an unauthorized work stoppage on the same day. The Claimant was specifically charged with violating Rules 59 and 67.

The detailed respective positions of the parties are:

COMPANY

The Company maintains that the evidence produced at the June 27, 1969, Investigation clearly established that the Claimant absented himself from work without permission on June 16, 1969, and was seen walking in a picket line wearing a placard stating that "REA Express unfair to organized labor." The Manager of the Company's Air Services also testified that he observed the Claimant adjusting the placards on the pickets as well as walking in line with them. The Company also alluded to the testimony of its supervisory staff who stated that they observed the Claimant from 6:30 P.M. to midnight talk to customers of the Company as they approached the Facility and that these customers then turned around and did not enter the offices of the Facility.

The Company stresses that there was no basis for an unauthorized work stoppage. Subsequent litigation initiated by the Company resulted in a decision by the Federal District Court for Northern Georgia holding that the dispute giving rise to the walkout was a "minor dispute" over which this Special Board of Adjustment had cognizance.

The International President of the Organization had also recognized that the walkout by the employees was illegal and a breach of the existing Schedule Agreement. The Company added that the walkout had caused it great financial loss in the amount of approximately $75,000 a day.

The Company states that there is no substance to the Organization's contention that the Investigation was unfair or prejudicial to the Claimant. It states at the Appeal Hearing it accepted statements from five employees even though these employees were available to testify at the original investigation.

The Company states that although there may have been a conflict in the testimony it was the duty and responsibility of the hearing to resolve these conflicts. It particularly notes that although the Claimant denied that he picketed the Facility at approximately 3:00 P.M. on June 16, 1969, he conceded that he did engage in picketing later (Pages 12 and 13 of Transcript of Investigation). The Company also denies that there was any breach of the Claimant's procedural rights because the officer who signed the charges against the Claimant also testified at the Investigation. The Company states that this is standard practice under the Schedule Agreement. The Company states further that it did not violate any procedural rights of the Claimant because it refused to grant a postponement of the Investigation until the work stoppage ceased. There was no justification for such a request.

The Company states that since the Claimant was a member of the Protective Committee, he had a greater responsibility than other employees in seeing that Union members committed no violation of their collective bargaining agreement.

UNION

The Organization states that the employees were unreasonably provoked because they believed the Company was contracting away their work to Delta Airline employees. It adds that it is not a complete answer for the Company to tell this Board that no REA employee lost his job as a result of awarding the work to Delta Airline employees, because as a result of the disciplinary action taken by the Company in dismissing a number of employees, it was not necessary to furlough or lay off employees.

The Organization states that if the Company had any special operational problem it could have discussed it with the General Chairman who has always listened sympathetically and who has negotiated more than 100 local agreements with the Company to meet a variety of local problems. However, the Company chose secretly to negotiate with all the airlines in the Atlanta area and persisted in giving the Union officers the "cold shoulder" and ignoring them when they sought to ascertain what developments were taking place concerning the arrangements being worked out with the several airlines. The Organization stresses that the Company was in error when they designated the arrangement effected with Delta Airlines as a "ramp transfer" Shipment because such shipments can only properly be made from one plane to another when there is no express facility available.

The Organization states that the Company singled out the Claimant because he was a member of the Protective Committee and the Manager was very hostile toward him. It states that the Claimant was the only employee cited for picketing although there were other employees engaged in similar conduct. The Organization adds that it was not a

single incident which led to the events at Atlanta but rather it was a gradual buildup of many things.

The Organization states that the Company did not prove its charges against the Claimant and that the Company witnesses were very specific at times in their testimony but could not remember other coincidental matters. It also maintains that the Investigation was not fair and impartial and the Company's witnesses were prejudiced against the Claimant. It also maintains that even if the charges were proved, the discipline imposed against the Claimant was excessive.

Findings

Findings: The Special Board, upon the whole record and all the evidence, finds that the employee and Company are Employee and Company within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that there is adequate competent evidence to uphold a disciplinary sanction against the Claimant. The record is clear that he participated, without legal or contractual warrant, in a course of conduct which was inimical to the best interests of the Company, the Union and the employees. It should be clear at this juncture that neither the Union officers nor the rank and file may resort to direct action to enforce what they believe are valid demands. The employees through their duly designated representatives have voluntarily but solemnly entered into an agreement which provides an orderly and fair method for resolving differences concerning the application and interpretation of the Agreement. When employees ignore or

violate the grievance provisions of the Agreement they proceed at their peril.

The Board is moved to remit the dismissal of the Claimant into a suspension only because he is an employee with almost 26 years seniority and with only one prior blemish on his record—a week's suspension which occurred in 1947. There is no evidence that the Claimant participated in any form of violence to property or bodily harm to any person. It is for these reasons that the Board must hold dismissal too severe a penalty and modify it to a suspension without pay with seniority unimpaired. A suspension for more than one year in this particular case is a more commensurate disciplinary sanction.

AWARD: Claim disposed of in accordance with Findings.

/s/ JACOB SEIDENBERG
Jacob Seidenberg, Chairman and Neutral Member

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J. J. Callan, Company Member

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D. E. Watkins, Employee Member

September 10, 19[illegible]